Supreme Court, U. S.
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ROBAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-849

SMITH'S FOOD KING, a corporation,

Petitioner,

vs.

RETAIL CLERKS UNION, LOCAL 1442, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Respondent.

Supplemental Appendix to Petition for Writ of Certiorari.

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Order.

United States Court of Appeals, for the Ninth Circuit.

Smith's Food King, a corporation, Appellant, v. Retail Clerks Union, Local 1442, Retail Clerks International Association, AFL-CIO, an unincorporated association; Doe Individual One through Doe Individual Five Hundred; and Doe Association One through Doe Association Ten (inclusive of all intervening numbers as though each Doe were separately and severally designated), Appellees. No. 77-3377.

Filed: Sept. 4, 1979.

Appeal from the United States District Court for the Central District of California.

Before: BROWNING and GOODWIN, Circuit Judges, and East*, District Judge.

Appellant's petition for rehearing, filed August 17, 1979, has been considered by the court, and is Denied.

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Order.

United States District Court, Central District of California.

Smith's Food King, a corporation, Plaintiff, v. Retail Clerks Union, Local 1442, Retail Clerks International Association, AFL-CIO, an unincorporated association, etc., et al., Defendants. Case No. 77-2342-WMB.

Filed: July 29, 1977.

This cause came on to be heard on July 18, 1977 at 10:00 A.M. in the courtroom of the Honorable William Matthew Byrne, Jr., Judge of the above-captioned Court, in the United States Courthouse, 312 North Spring Street, Los Angeles, California, on Plaintiff's Motion For Preliminary Injunction and Defendant's Motion to Dismiss, and the Court having considered the pleadings, memoranda of points and authorities, exhibits, affidavits and all other documents on file, and having heard Counsel for the respective parties, and the Court having made and filed its findings of fact and conclusions of law it is

ORDERED that Plaintiff's Motion For Preliminary Injunction be and the same hereby is denied and that Defendant's Motion to Dismiss be and the same hereby is granted and that this case be, and the same is hereby, dismissed.

Dated: July 28, 1977.

/s/ William Matthew Byrne, Jr.
UNITED STATES DISTRICT JUDGE

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Smith's Food King, a corporation, Plaintiff, v. Retail Clerks Union, Local 1442, Retail Clerks International Association, AFL-CIO, an unincorporated association, etc., et al., Defendants. Case No. 77-2342-WMB.

Filed: Aug. 2, 1977.

The above-captioned matter came on for hearing on July 18, 1977 before the Honorable William Matthew Byrne, Jr., Judge of the above-named Court, in the United States Courthouse, 312 North Spring Street, Los Angeles, California; the Court having considered the pleadings, memoranda of points and authorities, exhibits, affidavits, and all other documents on file herein, and having heard counsel for the respective parties, hereby finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiff, Smith's Food King, is a Utah corporation doing business in the State of California and owns and operates a chain of retail grocery stores.

2. Defendant, Retail Clerks Union, Local 1442, chartered by and affiliated with Retail Clerks International Association, AFL-CIO, is an unincorporated labor association in which employees participate and which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.

3. Plaintiff and Defendant entered into an executed, written collective bargaining agreement on or about July 28, 1975, for a term of agreement extending

through July 30, 1978. Said agreement provides for and establishes wages, hours, benefits, and other working conditions for retail clerks employed by Plaintiff, which employees are represented by Defendant.

4. Said agreement contains a grievance and arbitration procedure at Article XIV for the disposition of all grievances. Said Article XIV specifically provides that whenever any grievance cannot be resolved between the parties, the dispute shall be submitted to an impartial arbitrator for his final and binding determination.

5. Article XIV also contains a no strike clause, which provides that during the term of this agreement, there shall be no cessation or stoppage of work, lockout, picketing or boycotts. However, there is a specific exception contained in that clause which states that this limitation is not binding on either party if the other party refuses or fails to abide by, accept or perform a decision or award of an arbitrator or arbitration board.

6. In or about March, 1975, a dispute arose between Defendant and Plaintiff concerning performance of bargaining unit work by non-bargaining unit personnel. More specifically, employees of employers other that Plaintiff, *i.e.*, drivers or salesmen of suppliers, were performing work in Smith's Food King stores, which work belongs to retail clerks who are covered by this collective bargaining agreement.

7. In or about August, 1975, the Union and the employer agreed to arbitrate the dispute and on or about August 29, 1975, the parties selected Frederic Meyers as the impartial arbitrator.

8. A hearing was held on June 11, 1976 in Los Angeles, California, and on October 27, 1976, Arbi-

trator Frederic Meyers rendered his award upholding the Union's grievance and awarding damages as per the governing terms of the agreement. On or about October 27, 1976, Arbitrator Frederic Meyers served said award upon the parties.

9. On January 14, 1977, Defendant filed a Petition To Confirm Arbitration Award in the Superior Court of California, County of Los Angeles. On February 28, 1977, Defendant filed a Notice of Motion and Motion For Order Confirming Arbitration Award, along with supporting points and authorities.

10. On March 4, 1977, Defendant filed a Memorandum of Points and Authorities in Opposition to the Petition to Confirm the Arbitration Award.

11. On March 21, 1977, said petition to confirm was heard by The Honorable George M. Dell, Judge of the Superior Court of the State of California for the County of Los Angeles, in Department 82 thereof. On that date, a minute order was entered granting the Petition to Confirm the Award.

12. On May 19, 1977, the Superior Court of the State of California for the County of Los Angeles, after considering the Union's proposed Findings of Fact and Conclusions of Law and Proposed Judgment, and after rejecting all material objections to said Findings of Fact and Conclusions of Law and Judgment offered by Plaintiff, filed the original Judgment Confirming Award of Arbitrator and the Findings of Fact and Conclusions of Law. On May 20, 1977, the Superior Court entered judgment, and sent a Notice of Entry to Counsel for both parties.

13. On or about June 16, 1977, Michael A. Straeter, President, Retails Clerks Union, Local 1442, directed a letter to the Food Employers Council, Inc.

stating that Plaintiff is in violation of Article XIV, Section B, Paragraph 2 of the collective bargaining agreement by non-compliance with Arbitrator Frederic Meyers' award rendered on October 27, 1976. The letter goes on to state that if compliance with the award is not rendered within 48 hours of receipt of the letter, Plaintiff could expect a strike sometime thereafter.

14. On June 21, 1977, Plaintiff filed in Superior Court a Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, and for Specific Performance of Agreement to Arbitrate, and on that same date sought a Temporary Restraining Order and also filed a Memorandum of Points and Authorities and Declarations. An ex parte hearing was held that afternoon, at which time no restraining order was issued; the matter was set down for an Order to Show Cause on June 30, 1977, in Department 85 of the Superior Court.

15. On June 24, 1977, Defendant filed in the United States District Court for the Central District of California a Petition for Removal of Civil Action, attaching thereto copies of all documents filed in the State Court Action, a Notice of Filing of Petition and Bond for Removal, and on that same date delivered a copy of said Petition and Notice to the Clerk of the Superior Court.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this action under Section 301 of the National Labor Relations Act, as amended, 29 U.S.C. §185 without regard to the amount in controversy.

2. The provisions of the Norris-LaGuardia Act, 29 U.S.C. §101 *et seq.* govern the case at bar, in that this Court does not have jurisdiction to issue any restraining order or temporary or permanent injunction growing out of or involving the labor dispute between Plaintiff and Defendant, in that this case is not within any of the statutory or judicial exceptions to said Norris-LaGuardia Act.

3. The narrow exception to the Norris-LaGuardia Act prohibition against injunctions in labor disputes carved out by the United States Supreme Court in *Boys Markets, Inc. v. Retail Clerks Union, Local 770,* 398 U.S. 235 (1970) does not apply to the case at bar. The essence of the *Boys Markets* exception and the key to the issuance of a Boys Markets injunction is a finding that the issue underlying the work stoppage is subject to the arbitration clause of the applicable agreement and that a party to that agreement undermines the effectiveness of the arbitration machinery by engaging in the work stoppage and thereby forces the grievance to be resolved by economic pressure and not by the reasoned decision of an arbitrator for which the parties have bargained. These factors are not present in this case, in that the dispute underlying the threatened work stoppage here, *i.e.*, the Plaintiff's failure to abide by the arbitration award, is not even remotely subject to the arbitration procedure.

4. Numerous circuit courts including the Ninth Circuit in *Martin Hageland, Inc. v. United States District Court,* 460 F.2d 789 (9th Cir. 1972), and the United States Supreme Court in *Buffalo Forge Company v. United Steel Workers of America,* 428 U.S. 397 (1976) have emphasized the narrowness of the *Boys Markets* exception and have held that there is no general Federal

anti-strike policy. These cases held that the *Boys Markets* left the strictures of the Norris-LaGuardia Act undisturbed, absent a contractual obligation on the part of both parties to submit to compulsory arbitration.

5. In the instant case, the parties have already, by mutual consent, gone through the arbitration process and the award of the arbitrator has been confirmed by the Superior Court of California for the County of Los Angeles and thereby converted into a judgment. The Union has done what it is required of it under the agreement to peacefully resolve the controversy. The application by Defendant to confirm the award of Frederic Meyers is not part of the arbitration proceeding; there is no issue now ripe for arbitration, and with arbitration now complete, the Union has turned to various other methods to compel compliance with that award, *State of New York v. Local 144*, 410 F.Supp. 225 (S.D.N.Y. 1976). A work stoppage or the threat of such work stoppage is, under the circumstances presented herein, entirely lawful under the collective bargaining agreement and applicable law.

WHEREFORE, an order denying Plaintiff's Motion For A Preliminary Injunction and granting Defendant's Motion to Dismiss will be issued in favor of Defendant, and judgment will be entered in conformity therewith. Dated: July 30, 1977.

/s/ William Matthew Byrne, Jr.
UNITED STATES DISTRICT JUDGE